

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

August 11, 2005

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

BROOKS RUN MINING CO., LLC

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Docket No. WEVA 2005-195
A.C. No. 46-06045-000059820

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On July 25, 2005, the Commission received from Brooks Run Mining Company, LLC (“Brooks Run”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Brooks Run states that on June 17, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Brooks Run for three citations issued to the company by MSHA on January 27, 2005. Mot. at 1-2. Brooks Run had already timely contested all three citations, which are the subject of Docket Nos. WEVA 2005-77-R, WEVA 2005-78-R, and WEVA 2005-79-R. *Id.* at 2. These proceedings are currently before Commission Administrative Law Judge David Barbour and are scheduled for hearing on September 7, 2005. *Id.*

Brooks Run states that it mailed a contest of the proposed penalty assessment at issue on

July 21, 2005,¹ but was informed by MSHA's Assessment Office that a timely contest had to be filed "within 30 days of the date of the proposed assessment, June 17, 2005." *Id.* To the contrary, section 105(a) of the Mine Act states that an operator may file a contest "within 30 days from the *receipt* of the notification" of a proposed penalty. 30 U.S.C. § 815(a). Here, however, Brooks Run provides no information on when it received MSHA's proposed penalty assessment, and we are thus unable to determine whether Brooks Run is, in fact, in default. The Secretary states that she does not oppose Brooks Run's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

¹ Brooks Run states it did not file a contest earlier because of "the occurrence of a vacation period." Mot. at 2.

Having reviewed Brooks Run's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Brooks Run is, in fact, in default, and if so, whether good cause exists for Brooks Run's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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